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Desputeaux *v.* Éditions Chouette (1987) inc., [2003] 1 S.C.R. 178, 2003 SCC 17

Les Éditions Chouette (1987) inc. and Christine L'Heureux *Appellants*

v.

Hélène Desputeaux *Respondent*

and

Régis Rémillard *Mis en cause*

and

Quebec National and International Commercial Arbitration Centre, Union des écrivaines et écrivains québécois, Conseil des métiers d'art du Québec and Regroupement des artistes en arts visuels du Québec *Interveners*

Indexed as: Desputeaux *v.* Éditions Chouette (1987) inc.

Neutral citation: 2003 SCC 17.

File No.: 28660.

2002: November 6; 2003: March 21.

Present: Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for quebec

Arbitration — Interpretation of contract between artist and promoter — Copyright — Whether Copyright Act prevents arbitrator from ruling on question of copyright — Copyright Act, R.S.C. 1985, c. C-42, s. 37.

Arbitration — Interpretation of contract between artist and promoter — Copyright — Public order — Whether question relating to ownership of copyright falls outside arbitral jurisdiction because it must be treated in same manner as question of public order relating to status of persons and rights of personality — Whether Court of Appeal erred in stating that erga omnes nature of decisions concerning copyright ownership is bar to arbitration proceeding — Civil Code of Québec, S.Q. 1991, c. 64, art. 2639 — Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01, s. 37.

Arbitration — Arbitration award — Validity — Extent of arbitrator's mandate — Interpretation of contract between artist and promoter — Whether arbitrator exceeded mandate by ruling on question of copyright ownership — Whether award should be annulled because arbitrator did not comply with requirements respecting form and substance of contracts between artists and promoters — Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01, ss. 31, 34.

Arbitration — Arbitration award — Consideration of matter of public order — Limits on review of validity of arbitration awards — Code of Civil Procedure, R.S.Q., c. C-25, arts. 946.4, 946.5.

Arbitration — Procedure — Natural justice — Methods of proof — Interpretation of contract between artist and promoter — Whether arbitration proceeding conducted in violation of rules of natural justice.

D, L and C formed a partnership for the purpose of creating children's books. L was the manager and majority shareholder in C. D drew and L wrote the text for the first books in the Caillou series. Between 1989 and 1995, D and C entered into a number of contracts relating to the publication of illustrations of the Caillou character. D signed as author and L signed as publisher. In 1993, the parties signed a contract licensing the use of the Caillou character. D and L represented themselves in it as co-authors and assigned certain reproduction rights to C, excluding rights granted in the publishing contracts, for the entire world, with no stipulation of a term. The parties waived any claims based on their moral right in respect of Caillou. They also authorized C to grant sub-licences to third parties without their approval. A rider signed in 1994 provided that in the event that D produced illustrations to be used in one of the projects in which Caillou was to be used, she was to be paid a lump sum corresponding to the work required. In 1996, faced with difficulties in respect of the interpretation and application of the licence contract, C brought a motion to secure recognition of its reproduction rights. D brought a motion for declinatory exception seeking to have the parties referred to an arbitrator as provided in s. 37 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*. The Superior Court, finding that the existence of the contract was not in issue, and that there were no allegations in respect of its validity, referred the case to arbitration. The arbitrator decided that his mandate included interpreting all the contracts and the rider. In the arbitrator's view, Caillou was a work of joint authorship by D and L. With respect to the licence and the rider, the arbitrator concluded that C held the reproduction rights and that it alone was authorized to use Caillou in any form and on any medium, provided that a court agreed that the contracts were valid. The Superior Court dismissed D's motion for annulment of the arbitration award. The Court of Appeal reversed that judgment.

Held: The appeal should be allowed. The arbitrator acted in accordance with his terms of reference and made no error such as would permit annulment of the arbitration award.

The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. Subject to the applicable statutory provisions, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform. In this case, however, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by an exchange of correspondence between the parties and the arbitrator. The Superior Court's first judgment limited the arbitrator's jurisdiction by removing any consideration of the problems relating to the validity of the agreements from him. That restriction necessarily included any issues of nullity based on compliance by the agreements with the mandatory formalities imposed by ss. 31 and 34 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*. The arbitrator therefore had to proceed on the basis that this problem was not before him. With respect to the question of copyright, and ownership of that copyright, in order to understand the scope of the arbitrator's mandate, a purely textual analysis of the communications between the parties is not sufficient. In addition to what is expressly set out in the arbitration agreement, the arbitrator's mandate includes everything that is closely connected with that agreement. Here, from a liberal interpretation of the arbitration agreement, based on identification of its objectives, it can be concluded that the question of co-authorship was intrinsically related to the other questions raised by the arbitration agreement.

Section 37 of the *Copyright Act* does not prevent an arbitrator from ruling on the question of copyright. The provision has two objectives: to affirm the jurisdiction that the provincial courts, as a rule, have in respect of private law matters concerning copyright and to avoid fragmentation of trials concerning copyright that might result from the division of jurisdiction *ratione materiae* between the federal and provincial courts in this field. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. By assigning shared jurisdiction *ratione materiae* in respect of copyright to the Federal Court and provincial courts, s. 37 is sufficiently general to include arbitration procedures created by a provincial statute.

The arbitration award is not contrary to public order. In interpreting and applying the concept of public order in the realm of consensual arbitration in Quebec, it is necessary to have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. Except in certain fundamental matters referred to in art. 2639 *C.C.Q.*, an arbitrator may dispose of questions relating to rules of public order, since they may be the subject matter of the arbitration agreement. Public order arises primarily when the validity of an arbitration award must be determined. Under art. 946.5 *C.C.P.*, the court must examine the award as a whole to determine the nature of the result. It must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. Here, the Court of Appeal erred in holding that cases involving ownership of copyright may not be submitted to arbitration, because they must be treated in the same manner as questions of public order, relating to the status of persons and rights of personality. In the context of Canadian copyright legislation, although the work is a "manifestation of the personality of the author", this issue is very far removed from questions relating to the status and capacity of persons and to family matters, within the meaning of art. 2639 *C.C.Q.* The *Copyright Act* is primarily concerned with the economic management of copyright, and does not prohibit artists from entering into transactions involving their copyright, or even from earning revenue from the exercise of the moral rights that are part of it. In addition, s. 37 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* recognizes the legitimacy of transactions involving copyright, and the validity of using arbitration to resolve disputes arising in respect of such transactions.

The Court of Appeal also erred in stating that the fact that a decision in respect of copyright may be set up against the entire world, and accordingly the nature of its effects on third parties, is a bar to the arbitration proceeding. The *Code of Civil Procedure* does not consider the effect of an arbitration award on third parties to be a ground on which it may be annulled or its homologation refused. The arbitrator ruled as to the ownership of the copyright in order to decide as to the rights and obligations of the parties to the contract. The arbitral decision is authority between the parties, but is not binding on third parties.

Finally, by adopting a standard of review based on simple review of any error of law made in considering a matter of public order, the Court of Appeal applied an approach that runs counter to the fundamental principle of the autonomy of arbitration and extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases provided for in the *Code of Civil Procedure*. Public order will of course always be relevant, but solely in terms of the determination of the overall outcome of the arbitration proceeding.

D has not established a violation of the rules of natural justice during the arbitration proceeding.

Cases Cited

Approved: *Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708; *Mousseau v. Société de gestion Paquin ltée*, [1994] R.J.Q. 2004; *Compagnie nationale Air France v. Mbaye*, [2000] R.J.Q. 717; *International Civil Aviation Organization v. Tripal Systems Pty. Ltd.*, [1994] R.J.Q. 2560; *Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Constructions Méridien inc.*, [1996] R.J.Q. 1236; *Régie de l'assurance-maladie du Québec v. Fédération des médecins spécialistes du Québec*, [1987] R.D.J. 555; *Tuyaux Atlas, une division de Atlas Turner Inc. v. Savard*, [1985] R.D.J. 556; **referred to:** *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, [1994] R.J.Q. 1183; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206; *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Auerbach v. Resorts International Hotel Inc.*, [1992] R.J.Q. 302; *Goulet v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 719, 2002 SCC 21; *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783; *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565; *Société Seagram France Distribution v. Société GE Massenez*, Cass. civ. 2^{e}, May 3, 2001, *Rev. arb.* 2001.4.805; *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34; *Entreprises H.L.P. inc. v. Logisco inc.*, J.E. 93-1707; *Moscow Institute of Biotechnology v. Associés de recherche médicale canadienne (A.R.M.C.)*, J.E. 94-1591.

Statutes and Regulations Cited

Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01, ss. 31, 34, 37, 42.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 2638, 2639, 2640, 2643, 2848.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 33, 846, 943, 943.1, 944.1 [am. 1992, c. 57, s. 422], 944.10, 946.2, 946.4, 946.5, 947, 947.1, 947.2.

Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), Sched., Art. 5.

Constitution Act, 1867, ss. 92(14), 96, 101.

Copyright Act, R.S.C. 1985, c. C-42, ss. 2 "work of joint ownership", 9 [rep. & sub. 1993, c. 44, s. 60], 13, 14.1 [ad. 1985, c. 10 (4th Supp.), s. 4], 37 [am. 1997, c. 24, s. 20].

Authors Cited

Antaki, Nabil N. *Le règlement amiable des litiges*. Cowansville, Qué.: Yvon Blais, 1998.

Bachand, Frédéric. "Arbitrage commercial: Assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les arbitres" (2001), 35 *R.J.T.* 465.

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 5e éd. Cowansville, Qué.: Yvon Blais, 1998.

Blessing, Marc. "Arbitrability of Intellectual Property Disputes" (1996), 12 *Arb. Int'l* 191.

Brierley, John E. C. "Chapitre XVIII de la convention d'arbitrage, articles 2638-2643" dans *La réforme du Code civil: obligations, contrats nommés*, t. 2. Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec. Ste-Foy, Qué.: Presses de l'Université Laval, 1993, 1067.

Brierley, John E. C. "La convention d'arbitrage en droit québécois interne", [1987] *C.P. du N.* 507.

Brierley, John E. C. "Une loi nouvelle pour le Québec en matière d'arbitrage" (1987), 47 *R. du B.* 259.

Brun, Henri, et Guy Tremblay. *Droit constitutionnel*, 4e éd. Cowansville, Qué.: Yvon Blais, 2002.

Fortier, L. Yves. "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143.

Fouchard, Gaillard, Goldman on International Commercial Arbitration, edited by E. Gaillard and J. Savage. The Hague: Kluwer Law International, 1999.

Goudreau, Mistrale. "Le droit moral de l'auteur au Canada" (1994), 25 *R.G.D.* 403.

Grantham, William. "The Arbitrability of International Intellectual Property Disputes" (1996), 14 *Berkeley J. Int'l L.* 173.

Racine, Jean-Baptiste. *L'arbitrage commercial international et l'ordre public*, t. 309. Paris: L.G.D.J., 1999.

Royer, Jean-Claude. *La preuve civile*, 2e éd. Cowansville, Qué.: Yvon Blais, 1995.

Thuilleaux, Sabine. *L'arbitrage commercial au Québec: droit interne – droit international privé*. Cowansville, Qué.: Yvon Blais, 1991.

APPEAL from a judgment of the Quebec Court of Appeal, [2001] R.J.Q. 945, 16 C.P.R. (4th) 77, [2001] Q.J. No.1510 (QL), reversing a decision of the Superior Court. Appeal allowed.

Stefan Martin and *Sébastien Grammond*, for the appellants.

Normand Tamaro, for the respondent.

Pierre Bienvenu and *Frédéric Bachand*, for the intervener the Quebec National and International Commercial Arbitration Centre.

Daniel Payette, for the interveners the Union des écrivaines et écrivains québécois and the Conseil des métiers d'art du Québec.

Louis Linteau, for the intervener the Regroupement des artistes en arts visuels du Québec.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

1 The friendly face of Caillou, with his round cheeks and expression of wide-eyed surprise, has delighted countless young children and won over their parents and grandparents. Today, this charming little character, a creation that sprang from the imagination and from the art of form and colour, is moving out of the world where he welcomes his new baby sister, or gets ready for kindergarten. Unintentionally, no doubt, he is now making a contribution to the development of commercial arbitration law in the field of intellectual property. What has happened is that the people who consider themselves to be his mothers are engaged in battle for him. The respondent claims exclusive maternity. The appellants believe it was a joint effort. The manner in which their dispute is to be resolved has itself become the subject of a major disagreement, and that is what is now before this Court.

2 A decision of the Quebec Court of Appeal annulled the arbitration award made by the *mis*

en cause Rémillard, who had found in part for the appellants on the question of the intellectual property in the Caillou character. The respondent Desputeaux is seeking to have that judgment affirmed. In her submission, the arbitrator did not remain within the bounds of his terms of reference. She contends, as well, that he disposed of an issue that is not a proper subject of arbitration: copyright ownership. She further submits that the arbitration proceeding was conducted in violation of the fundamental principles of natural justice and procedural fairness. Her final argument is that the arbitrator's decision violated the rules of public order. The appellants dispute those contentions and argue that the Court of Appeal's judgment should be set aside and the arbitration award restored, in accordance with the disposition made by the Superior Court. For the reasons that follow, I am of the opinion that the appeal must be allowed. The arbitrator acted in accordance with the terms of reference he was given. The allegation that the rules of natural justice were violated has not been substantiated. The arbitrator had the authority to dispose of the issues before him. As well, there was no violation of the rules of public order that would justify the superior courts in annulling the award.

II. Origin of the Case

3 In 1988, the respondent and the appellants Christine L'Heureux and Les Éditions Chouette (1987) inc. ("Chouette") formed a partnership for the purpose of creating children's books. The appellant L'Heureux was the manager and majority shareholder in Chouette. The first books in the Caillou series were published in 1989. While the respondent drew the little fictional character, L'Heureux wrote the text for the first eight books. Between May 5, 1989, and August 21, 1995, the respondent and the appellant Chouette entered into a number of contracts relating to the publication of illustrations of the Caillou character in the forms of books and derivative products. All those contracts were for a period of ten years and were signed by the respondent, as author, and the appellant L'Heureux, as publisher. The parties were using standard forms drafted as provided in an agreement between the Association des éditeurs and the Union des écrivaines et écrivains québécois. The parties inserted only the particulars that related specifically to them, such as the title of the work, the territory covered, the term of the agreement and the percentage of royalties payable to the author.

4 On September 1, 1993, the parties signed a contract licensing the use of the fictitious Caillou character. The respondent and the appellant L'Heureux represented themselves in it as co-authors of a work consisting of a fictitious character known by the name Caillou. They assigned the following rights ("reproduction rights") to the appellant Chouette, excluding rights granted in the publishing contracts, for the entire world, with no stipulation of a term:

[TRANSLATION]

(a) The right to reproduce CAILLOU in any form and on any medium or merchandise;

(b) the right to adapt CAILLOU for the purposes of the creation and production of audio and/or audiovisual works, performance in public and/or communication to the public of any resulting work;

(c) the right to apply, as owner, for registration of the name CAILLOU in any language whatsoever, or of the graphic representation of CAILLOU, as a trademark;

(d) the right to apply, as owner, for registration of any visual configurations or characteristics of CAILLOU as an industrial design.

5 The parties waived any claims based on their moral right in respect of Caillou. Their agreements also authorized Chouette to grant sub-licences to third parties, without the approval of the other parties to the contracts. On December 15, 1994, the parties added a rider to the agreement of September 1, 1993, which neither replaced nor cancelled the previous publishing contracts, but amended the contract of September 1, 1993, as it related to the royalties payable in respect of the licence for the use of the fictitious Caillou character. In the event that Desputeaux produced illustrations to be used in one of the projects in which the character was to be used, she was to be paid a lump sum corresponding to the work required. Neither the rider nor the licence contract specified the term of the agreement between the parties.

6 In October 1996, difficulties arose in respect of the interpretation and application of the licence contract, and Chouette brought a motion for a declaratory judgment. The applicant's purpose in bringing the motion was to secure recognition of its entitlement to exploit the reproduction rights. The respondent then brought a motion for declinatory exception seeking to have the parties referred to an arbitrator. On February 28, 1997, Bisaillon J. of the Superior Court allowed the declinatory exception and referred the case to arbitration: [1997] Q.J. No. 716 (QL). He found, based on the relief sought by the parties in the two motions, that the existence of the contract was not in issue, and that there were no allegations in respect of the validity of the contract.

7 After hearing the case, the arbitrator appointed by the parties, Régis Rémillard, a notary, concluded that Chouette held the reproduction rights sought and that it alone had the right to use the Caillou character. The Superior Court dismissed a motion for annulment of the award. The appeal from that judgment was unanimously allowed by the Court of Appeal, which annulled the award, and it is that decision which has been appealed to this Court.

III. Relevant Statutory Provisions

8 *Copyright Act*, R.S.C. 1985, c. C-42

2. . . .

"work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

13. . . .

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

(4) Where a waiver of any moral right is made in favour of an owner or a licensee of

copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01

31. The contract must be evidenced in a writing, drawn up in duplicate, clearly setting forth

(1) the nature of the contract;

(2) the work or works which form the object of the contract;

(3) any transfer of right and any grant of licence consented to by the artist, the purposes, the term or mode of determination thereof, and the territorial application of such transfer of right and grant of licence, and every transfer of title or right of use affecting the work;

(4) the transferability or nontransferability to third persons of any licence granted to a promoter;

(5) the consideration in money due to the artist and the intervals and other terms and conditions of payment;

(6) the frequency with which the promoter shall report to the artist on the transactions made in respect of every work that is subject to the contract and for which monetary consideration remains owing after the contract is signed.

34. Every agreement between a promoter and an artist which reserves, for the promoter, an exclusive right over any future work of the artist or which recognizes the promoter's right to determine the circulation of such work shall, in addition to meeting the requirements set out in section 31,

(1) contemplate a work identified at least as to its nature;

(2) be terminable upon the application of the artist once a given period agreed upon by the parties has expired or after a determinate number of works agreed upon by the parties has been completed;

(3) specify that the exclusive right ceases to apply in respect of a reserved work where, after the expiration of a period for reflection, the promoter, though given formal notice to do so, does not circulate the work;

(4) stipulate the duration of the period for reflection agreed upon by the parties for the application of paragraph 3.

37. In the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.

The parties shall designate an arbitrator and submit their dispute to him according to such terms and conditions as may be stipulated in the contract. The provisions of Book VII of the Code of Civil Procedure (chapter C-25), adapted as required, apply to such arbitration.

42. Subject to sections 35 and 37, no person may waive application of any provision of this chapter.

Civil Code of Québec, S.Q. 1991, c. 64 ("*C.C.Q.*")

2639. Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.

An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.

2640. An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party.

2643. Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure.

2848. The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

However, a judgment deciding a class action has the authority of a final judgment in respect of the parties and the members of the group who have not excluded themselves therefrom.

Code of Civil Procedure, R.S.Q., c. C-25 ("*C.C.P.*")

943. The arbitrators may decide the matter of their own competence.

943.1 If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter.

While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.

944.1 Subject to this Title, the arbitrators shall proceed to the arbitration according to the procedure they determine. They have all the necessary powers for the exercise of their jurisdiction, including the power to appoint an expert.

944.10 The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages.

They cannot act as *amiable compositeurs* except with the prior concurrence of the parties.

They shall in all cases decide according to the stipulations of the contract and take account of applicable usage.

946.2. The court examining a motion for homologation cannot enquire into the merits of the dispute.

946.4. The court cannot refuse homologation except on proof that

(1) one of the parties was not qualified to enter into the arbitration agreement;

(2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;

(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or

(5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

946.5. The court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order.

947. The only possible recourse against an arbitration award is an application for its annulment.

947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation.

947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

IV. Judicial History

A. *Arbitration Award (Régis Rémillard, Notary)* (July 22, 1997)

9 The arbitrator first decided that his mandate included interpreting the contract concerning

the licence as well as the rider and the publishing contracts, to determine the method of commercial exploitation provided for by the licence. After examining the publishing contracts, he stated the opinion that the fact that the respondent had signed as "author" did not reflect reality. In his view, both Desputeaux and L'Heureux could, under the *Copyright Act*, R.S.C. 1985, c. C-42, claim the status of author in respect of Caillou, the appellant L'Heureux in respect of the literary portion of the original texts and the respondent in respect of the illustration and the physical aspect of the character. In the arbitrator's view, the involvement of the respondent and the appellant L'Heureux in the development of the Caillou character was indivisible. The work was therefore a work of joint authorship, within the meaning of s. 2 of the *Copyright Act*.

10 The licence contract for the fictitious Caillou character must therefore be considered in its context. It was signed after protracted negotiations between the parties, who were assisted by their lawyers. At that time, the respondent and the appellant L'Heureux each mutually recognized the other's status as co-author of the Caillou character, as confirmed by letters that were exchanged after the agreement was signed, which were submitted to the arbitrator. The arbitrator therefore quickly rejected the argument that the contract was a sham. In the agreement, the co-authors assigned the appellant Chouette all of the rights that were needed for the commercial exploitation of Caillou in the entire world. While the arbitrator did not refer to the public order provisions of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* ("*Act respecting the professional status of artists*"), he stated the opinion that because the parties had not stipulated a time limit, the contract was protected under s. 9 of the *Copyright Act*, for 50 years after the death of the last co-author. With respect to the rider of December 15, 1994, he said that the obligation to consult the respondent did not create a veto right. By his interpretation, neither the rider nor the licence contract imposed any obligation to account.

11 In conclusion, the arbitrator pointed out that the licence and the rider related solely to future works by the authors with the Caillou character as their subject. On this point, he stated that because Chouette held the reproduction rights, it was the only one authorized to use the Caillou character in any form and on any medium, provided that a court agreed that the contracts were valid. Mr. Rémillard refrained from stating an opinion on that subject. In my view, the judgment referring the matter to arbitration reserved that question to the Superior Court.

B. *Quebec Superior Court* (March 13, 1998)

12 Desputeaux then challenged the arbitration award, and asked the Superior Court to annul it. She argued, *inter alia*, that the arbitrator had ruled on a dispute that was not before him, the intellectual property in the Caillou character and the status of the parties as co-authors. She also criticized the arbitrator for failing to apply the mandatory provisions of the *Act respecting the professional status of artists*. In her submission, their application would have justified annulment of the agreements between the parties. The respondent also criticized Mr. Rémillard for ruling on the main

issues without evidence and for conducting the arbitration without regard for the fundamental rules of natural justice.

13 In a brief judgment delivered from the bench, Guthrie J. of the Superior Court dismissed the application for annulment. In his opinion, none of the grounds of nullity argued was material or well-founded. However, the judgment was mainly restricted to a summary of the content of the annulment proceeding and reference to the most important statutory provisions applicable, including the articles of the *Code of Civil Procedure* of Quebec relating to judicial review of the validity of arbitration decisions. Desputeaux then appealed to the Quebec Court of Appeal.

C. *Quebec Court of Appeal (Gendreau, Rousseau-Houle and Pelletier JJ.A.)*, [2001] R.J.Q. 945

14 The Quebec Court of Appeal took a more favourable view of the application for annulment made by Desputeaux. It unanimously allowed the appeal and annulled the arbitration award. To begin with, in the opinion of Rousseau-Houle J.A., the award was null under s. 37 of the *Copyright Act*. According to her interpretation, that provision requires that disputes as to ownership of copyright be heard by the Federal Court or the superior courts, and therefore does not authorize arbitration, even commercial arbitration, in that realm. In her opinion, the award exceeded the strict interpretation of the contract documents, in respect of which arbitration would have been possible: [TRANSLATION] "In deciding the legal status [of the respondent] and [of the appellant L'Heureux] in respect of the Caillou character, a work protected by the [*Copyright Act*], the arbitrator assumed a competence he did not have" (para. 32). Then, examining the case from the standpoint of the principles of the civil law, Rousseau-Houle J.A. added that disputes over the status and capacity of persons or other matters of public order may not be submitted to arbitration (art. 2639 *C.C.Q.* and art. 946.5 *C.C.P.*). She concluded, on this point, that the paternity of the respondent's copyright was a moral right that attached to her personality. Accordingly, art. 2639 *C.C.Q.* exempted it from the arbitrator's jurisdiction (at paras. 40 and 44):

> [TRANSLATION] The right precisely to credit for paternity of a work, like the right to respect for one's name, gives a purely "moral" connotation to the dignity and honour of the creator of the work. From these standpoints, the question of the paternity of copyright is not a matter for arbitration.
>
> . . .
>
> In ruling on the question of the monopoly granted by the [*Copyright Act*] to an author, the arbitrator made a decision that not only had an impact on the right to paternity of the work,

but could be set up against persons other than those involved in the dispute submitted for arbitration.

15 In the opinion of Rousseau-Houle J.A., the award also had to be annulled because the arbitrator had not applied, or had misinterpreted, ss. 31 and 34 of the *Act respecting the professional status of artists*, which lays down requirements in respect of the form and substance of contracts between artists and promoters. For one thing, the contracts did not state the extent of the exclusive rights granted, the frequency of the reports to be made or the term of the agreements. The violation of these rules of public order resulted in the nullity of the agreements and the award. The appellants were then granted leave to appeal to this Court. In addition, there are still other proceedings underway in the Superior Court in respect of various aspects of the legal relationship between the parties.

V. Analysis

A. *The Issues and the Positions of the Parties and Intervenors*

16 There are three categories of problems involved in this case, all of them connected to the central question of the validity of the arbitration award. First, we need to identify the nature and limits of the arbitrator's terms of reference. We will then have to identify the issue that was before the arbitrator, in order to determine whether and how those terms of reference were carried out. In considering that question, we will have to examine the grounds on which the respondent challenged the conduct of the arbitration proceeding, such as the violation of the principles of natural justice and the rules of civil proof. We shall then discuss the main issues in this appeal, which relate to the arbitrability of copyright problems and the nature and limits of judicial review of arbitration awards made under the *Code of Civil Procedure*. That part of the discussion will involve an examination of how rules of public order are applied by arbitrators and the limits on the powers of the courts to intervene in respect of decisions made in that regard.

17 The parties argued diametrically opposed positions, each of them supported by certain of the intervenors. I shall first summarize the arguments advanced by the appellants, with the broad support of one of the intervenors, the Quebec National and International Commercial Arbitration Centre ("the Centre"). I will then review the arguments made by the respondent and the other intervenors, the Union des écrivaines et écrivains québécois ("the Union") and the Regroupement des artistes en arts visuels du Québec ("RAAV"). Those intervenors took the same position as Desputeaux on certain points.

18 In the submission of the appellants, the arbitration award was valid. In their view, the legal approach taken by the Court of Appeal conflicted with the way that the civil and commercial arbitration function has been defined in most modern legal systems, and the decision-making autonomy that they recognize as inherent in that function. In particular, in the field of intellectual property itself, modern legal systems frequently use arbitration to resolve disputes (see M. Blessing, "Arbitrability of Intellectual Property Disputes" (1996),12 *Arb. Int'l* 191, at pp. 202-3; W. Grantham, "The Arbitrability of International Intellectual Property Disputes" (1996), 14 *Berkeley J. Int'l L.* 173, at pp. 199-219). On that point, the Centre pointed to the risks involved in the decision of the Court of Appeal and the need to protect the role of arbitration. In substance, Chouette and L'Heureux argued, first, that s. 37 of the *Copyright Act* did not prohibit arbitration of the ownership of copyright or the exercise of the associated moral rights. Nor do the provisions of the *Civil Code* and the *Code of Civil Procedure* prohibit an arbitrator from hearing those questions. In addition, an arbitrator may and must dispose of questions of public order that are referred to him or her, or are inherent in his or her terms of reference. Review of an arbitrator's decision is strictly limited to the grounds set out in the *Code of Civil Procedure*, which allows an award to be annulled for violation of public order only where the outcome of the arbitration is contrary to public order. It is not sufficient that an error have been committed in interpreting and applying a rule of public order in order for a court to be able to set aside an arbitrator's decision. The appellants also submitted that the matter of the status of the co-authors was before the arbitrator, and that he had complied with the relevant rules in conducting the arbitration, the arbitrator being in control of the procedure under the law. Chouette and L'Heureux concluded by saying that Mr. Rémillard could not be criticized for not ruling on the validity of the contracts, having regard to the *Act respecting the professional status of artists*. That question was not before him. What the judgment rendered by Bisaillon J., who referred the dispute to arbitration, had done was to reserve consideration of the problem of the validity of the contracts between the parties to the Superior Court.

19 The respondent first challenged the arbitrator's definition of his terms of reference. She argued that he had broadened them improperly by wrongly finding that the ownership of the copyright and the status of L'Heureux and Desputeaux as co-authors were before him. She further argued that he had erred in narrowing that definition by failing to apply the mandatory rules in the *Act respecting the professional status of artists* and thereby failing to rule as to the validity of the contracts in issue. Desputeaux also criticized the conduct of the arbitration proceeding, alleging that the arbitrator had disposed of the copyright issue and of the moral rights resulting from the copyright without evidence. In her submission, s. 37 of the *Copyright Act* denied the arbitrator any jurisdiction in this respect. As well, the *Civil Code of Québec* also did not permit those matters to be submitted to arbitration because they are matters of public order. All that could be submitted to arbitration under the *Act respecting the professional status of artists* was questions relating purely to the interpretation and application of the contracts. Desputeaux's final submission was that the Superior Court could have reviewed the arbitration award based on any error made in interpreting or applying a rule of public order. The respondent argued that the award was vitiated by errors of that nature, and that those errors justified annulling the award. She therefore sought to have the appeal dismissed. The Union and the RAAV supported her arguments in respect of the nature of copyright, the arbitrator's jurisdiction and the application of rules of public order.

B. *The Arbitrator's Terms of Reference*

20 We need only consider the parties' arguments to see that there is a preliminary problem in analysing this appeal. It would be difficult to assess the weight of the substantive law arguments made by either party, or the justification for intervention by the Superior Court, without first identifying the issues that were in fact before the arbitrator, either at the behest of the parties or pursuant to the earlier decisions of the courts. Simply by identifying those issues, we will be able to eliminate, or at least to narrow, certain questions of law or procedure. That would be the case if, for example, we were to conclude that the problem of ownership of the copyright was not before the arbitrator, by reason of the legislation that governed his decision. The award could then be annulled on that ground alone, under art. 946.4, para. 4 *C.C.P.*

21 The question of the scope of the arbitrator's mandate has influenced the course of the judicial proceedings in this case from the outset. There are serious difficulties involved in this problem, both because of the manner in which the arbitration proceedings were conducted and because of how the application for annulment that is now before this Court has been conducted. We can only regret that the parties and the arbitrator did not clearly define what his terms of reference included. That precaution would probably have reduced the number and length of the conflicts between the parties.

22 The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement (art. 2643 *C.C.Q.*). If the arbitrator steps outside that agreement, a court may refuse to homologate, or may annul, the arbitration award (arts. 946.4, para. 4 and 947.2 *C.C.P.*). In this case, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by a lengthy exchange of correspondence and pleadings between the parties and Mr. Rémillard.

23 First, however, we must note the importance of the judgment of the Superior Court rendered by Bisaillon J. As mentioned earlier, the parties' court battles had begun with the filing by Chouette of a motion for declaratory judgment. Chouette wanted to have the agreements between it and Desputeaux and L'Heureux declared to be valid, and its exclusive distribution rights in Caillou confirmed. Relying on s. 37 of the *Act respecting the professional status of artists*, the respondent brought a declinatory exception seeking to have the dispute referred to an arbitrator. Bisaillon J. allowed the motion in part. He referred the case to arbitration, except the question of the actual existence of the contract, and the validity of that contract, which, in his opinion, fell within the jurisdiction of the Superior Court. That judgment, which has never been challenged, limits the arbitrator's competence by removing any consideration of the problems relating to the validity of the agreements from him. That restriction necessarily included any issues of nullity based on compliance by the agreements with the requirements of the *Act respecting the professional status of artists*. The tenor of the judgment rendered by Bisaillon J. means that one of the respondent's criticisms, her complaint

that he had not considered or applied that Act, may therefore be rejected immediately. Given the decision of the Superior Court, the arbitrator had to proceed on the basis that this problem was not before him. What now remains to be determined is whether the question of copyright, and ownership of that copyright, was before Mr. Rémillard.

24 On this point, we must refer to the materials exchanged by the parties. The arbitration agreement in question in this case took the form of an exchange of letters rather than a single, complete instrument exhaustively stipulating all the parameters of the arbitration proceeding. While we may regret that the parties thus failed to circumscribe the arbitrator's powers more clearly, we must acknowledge that the rule made by the legislature in this respect was a very flexible one, despite the requirement that there be a written instrument: "An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party" (art. 2640 *C.C.Q.*).

25 Neither the courts below nor the arbitrator dwelt at length on the question of the actual content of the arbitration agreement. By letter dated May 13, 1997, the arbitrator confirmed his mandate to the parties, but he did not specify the scope of his terms of reference (Appellants' Record, at p. 61). There is no clear statement by the arbitrator in the arbitration award of the limits of his competence, with the exception of a few comments asserting that he was competent to interpret the contracts, but not to nullify them (see, for example, pp. 11 and 15 of the arbitration award and the first "Whereas" in the award (Appellants' Record, at pp. 65 *et seq.*)).

26 Nor does the succinct decision given by the Superior Court contain any indication as to the scope of the arbitrator's mandate. On that point, Guthrie J. simply said, at p. 3, without discussing the content of the agreement:

> [TRANSLATION] Whereas the applicant has not proved that the arbitration award dealt with a dispute that was not covered by the provisions of the arbitration agreement;
>
> . . .
>
> The Court dismissed the amended motion with costs.

Thus the trial judge failed to consider the question of the scope of the agreement having regard to all of

the facts, although the evidence in the record shows that this question was argued before him. Guthrie J. in fact refused to hear evidence concerning the argument made as to the scope of the arbitrator's mandate, because there was no transcript of argument before the arbitrator. (Excerpts from counsel's argument, Respondent's Record, at pp. 10 *et seq.*; Respondent's Factum, at para. 25; see also the amended motion by the respondent-applicant Hélène Desputeaux seeking to have the arbitration award annulled, October 28, 1997, Appellants' Record, at pp. 14 *et seq.*)

27 The Court of Appeal also addressed the question of the limits placed on the arbitrator's mandate by the agreement only briefly. It found that [TRANSLATION] "[i]t is difficult to argue, when we consider the relief sought by counsel for the appellant in the statement of facts that they submitted to the arbitrator, that the arbitration award dealt with a dispute that was not specifically mentioned in the arbitration agreement" (para. 31).

28 In the appellants' submission, the arbitrator's mandate was such that it was open to him to address the co-authorship question. The arbitrator was competent to interpret the contracts submitted to arbitration. In fact, art. 1 of the licence contract states that the appellant L'Heureux and the respondent are co-authors. Desputeaux analysed the content of the arbitrator's mandate much more restrictively. In her submission, the parties had agreed that the arbitrator was not to dispose of the co-authorship question. She further criticized the arbitrator for not having expressly stated that he was competent to dispose of that matter, and argued that this failure had made it impossible for her to contest that competence or place the relevant evidence on the record.

29 Although the letters exchanged by the parties in this respect were not reproduced in the appeal record, we do have a description of the content of those letters in the amended motion introduced by Ms. Desputeaux in the Superior Court, seeking to have the arbitration award annulled (amended motion of the respondent-applicant Hélène Desputeaux for annulment of an arbitration award, October 28, 1997, Appellants' Record, at pp. 12 *et seq.*). It seems that the first proposed mandate was prepared by Chouette on May 20, 1997. That proposal clearly addressed the question of co-authorship. In para. 8.1c), it said: [TRANSLATION] "[i]n the event of a decision favourable to Hélène Desputeaux on the interpretation of contracts R-1 (RR-3) and R-2 (RR-5), arbitration on the concept of co-authorship in order to establish the parties' rights". The respondent replied to that proposal on May 21, 1997, stating the question of co-ownership status as follows: [TRANSLATION] "Whether or not the decision is favourable to our client, are Ms. L'Heureux and Ms. Desputeaux the co-authors of Caillou?" On May 23, 1997, the appellant Chouette sent the respondent a true copy of a letter sent to the arbitrator in which the following passages, concerning the arbitrator's mandate, appear:

> [TRANSLATION] Accordingly, before going any further and before considering any other question, we should determine what interpretation is indicated by Exhibits R-1 (RR-3) and R-2 (RR- 5), we should see whether they are compatible and see what obligations they indicate for each of the parties.

> When that question has been disposed of, in accordance with your decision, we will be able to consider what financial obligation arises from those contracts, and the question of co-authorship.

30 On June 3, 1997, the respondent sent her record to the arbitrator; it included documents that were relevant in establishing copyright. On June 9, 1997, she again defined the arbitrator's mandate, in response to another letter sent to the parties by the arbitrator on June 4, 1997 (unfortunately not reproduced in the record). She confirmed at that time that she understood from that letter that the arbitrator intended to rule on the question of co-authorship. She then described the scope of the arbitrator's mandate as follows:

> [TRANSLATION] Mr. Rémillard will therefore consider the question of the real scope of Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15) and of what powers are available to Les Éditions Chouette (1987) inc. (point (a) of your letter of May 20, 1997).
>
> In our view, that interpretation will necessarily lead to the question of co-authorship, which you raised at the beginning of your letters of June 4, 1997, and May 20, 1997. Mr. Rémillard will have to tell us whether Exhibits R-1 (RR-3) and R-3 (RR-15), as interpreted in the entire context of the contractual relationship between the parties, is or is not an agreement between co-authors concerning their respective rights and obligations. . . .

31 On June 11, 1997, the appellant Chouette sent its final proposal for a mandate to the respondent and the arbitrator. It states as follows:

> [TRANSLATION] For our part, we in fact continue to believe that we should first address the interpretation of Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15), which obviously cannot be separated from their context.
>
> The other stage, the question of co-authorship, we are keeping on the agenda, and we are certain that Me Rémillard has complete competence to hear it. However, we still maintain that in the event that the interpretation of the contracts, Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15), is favourable to us, that discussion will be moot. We are therefore not committing ourselves to proceed on that subject.

The letter goes on to say, in respect of evidence that might be presented:

> [TRANSLATION] Obviously, if the discussion goes ahead on the question of the co-authorship concept, we reserve the right to reverse this decision and require that witnesses be heard and additional exhibits be introduced.

32 On June 11, 1997, the respondent ultimately reconsidered her understanding of the mandate, in the last letter exchanged between the parties. According to that letter, the question of co-authorship had been suspended and the arbitrator's competence in that respect depended on a new mandate being negotiated.

> [TRANSLATION] We note that we are in minimal agreement to proceed in respect of the interpretation of Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15).
>
> We shall therefore proceed on that clearly stated question. With respect to the other stages you suggest, we shall see whether it is possible to agree on a mandate that could be given to an arbitrator. We are not committing ourselves to any agreement in this respect and we reiterate our earlier correspondence.

33 That same day, adding to the confusion, the respondent amended the statement of facts she had submitted to the arbitrator, contradicting what it had said earlier. It now again sought to have the arbitrator rule as to the status of L'Heureux and the respondent as co-authors:

> [TRANSLATION] FOR ALL OF THE FOREGOING REASONS, MS. DESPUTEAUX ASKS THE HONOURABLE ARBITRATOR: . . . TO INTERPRET that, in accordance with the publishing contracts, Exhibit R-2, Ms. Desputeaux is the sole author and sole owner of the copyright in her illustrations of the Caillou character and in the character itself;

34 Subsequently, counsel for the respondent removed from the record all of the exhibits that could have been used by their client as evidence on the question of co-authorship. In the appellants' submission, and in the opinion of the Court of Appeal, the scope of the arbitrator's mandate is confirmed by the statement of the relief sought by the respondent in her statement of facts. In their view, the

respondent cannot both expressly ask the arbitrator to rule on a question and subsequently argue that he exceeded his mandate by ruling on the question (see Court of Appeal decision, at para. 31). However, the respondent now replies that the relief she sought was amended before the arbitrator, and that he annotated the statement of facts on the first day of the arbitration proceeding. Guthrie J. of the Superior Court refused to admit the annotated version of the statement of facts, and no copy was introduced by the parties in this Court. We therefore cannot consider that amendment to be an established fact in determining the scope of the mandate assigned to Mr. Rémillard.

35 Despite the unfortunate uncertainties that remain as to the procedure followed in defining the terms of reference for the arbitration, they necessarily included the problem referred to as "co-authorship" in the context of this case. In order to understand the scope of the arbitrator's mandate, a purely textual analysis of the communications between the parties is not sufficient. The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected with that agreement, or, in other words, questions that have [TRANSLATION] "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them" (S. Thuilleaux, *L'arbitrage commercial au Québec: droit interne — droit international privé* (1991), at p. 115). Since the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally (N. N. Antaki, *Le règlement amiable des litiges* (1998), at p. 103; *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, [1994] R.J.Q. 1183 (C.A.), at pp. 1185-86, *per* Rothman J.A.). From a liberal interpretation of the arbitration agreement, based on identification of the objectives of the agreement, we can conclude that the question of co-authorship was intrinsically related to the other questions raised by the arbitration agreement. For example, in order to determine the rights of Chouette to produce and sell products derived from Caillou, it is necessary to ascertain whether the owners of the copyright in Caillou assigned their patrimonial rights to Chouette. In order to answer that question, we must then identify the authors who were authorized to assign their patrimonial rights in the work.

36 Certain elements of the letters exchanged by the parties and of the arbitration award confirm the validity of that interpretation. For instance, in her letter of June 9, 1997, the respondent said that the interpretation of the contracts and the determination of the powers held by the appellant Chouette [TRANSLATION] "will necessarily lead to the question of co-authorship" (amended motion of the respondent-applicant Desputeaux to have an arbitration award annulled, Appellants' Record, at p. 16). In reply to that letter, Chouette pointed out that in the event that the interpretation of the contracts was favourable to it, the discussion of the question of co-authorship would become moot (amended motion of the respondent-applicant Desputeaux to have an arbitration award annulled, Appellants' Record, at p. 17). In addition, the following passage from p. 7 of the arbitration award indicates that the interpretation of the contracts in respect of ownership of the copyright is connected with questions relating to the powers of Chouette and the economic and moral rights associated with the commercial exploitation of the Caillou character:

> [TRANSLATION] The respective claims of the parties are based on ownership of the copyright in Caillou. What we must do is define that concept, in accordance with the law. We must determine whether those rights apply to everything connected with Caillou, or only

in respect of some of the components, if there is more than one owner of the copyright; we must also determine the respective shares both of the economic and moral rights deriving from the original literary and artistic production and of the rights in what are referred to as "derivative products".

37 Section 37 of the *Act respecting the professional status of artists* provides that every dispute arising from the interpretation of a contract between an artist and a promoter shall be submitted to an arbitrator. The nature of the questions of interpretation submitted to the arbitrator meant that it was necessary to consider the problem of ownership of the copyright. Plainly, that problem was intimately and necessarily connected to the interpretation and application of the agreements that the arbitrator had to examine. Because that question was in fact before the arbitrator, we must now consider whether the applicable legislation prohibited consideration of the question being assigned to him, as the respondent argues. Desputeaux's argument on that point is two-pronged. The first part is based on federal copyright legislation, which, in her submission, prohibits the question of the intellectual property in a work being referred to arbitration. The second is based on the provisions of the *Civil Code* and the *Code of Civil Procedure*, which provide that questions relating to personality rights may not be referred to arbitration. As we know, the decision that is on appeal here accepted both elements of that argument.

C. *Section 37 of the Copyright Act and Arbitration of Disputes Relating to Copyright*

38 In the opinion of the Court of Appeal, s. 37 of the *Copyright Act* prevented the arbitrator from ruling on the question of copyright, since that provision assigns exclusive jurisdiction to the Federal Court, concurrently with the provincial courts, to hear and determine all proceedings relating to the Act (para. 41). With respect, in my view the Court of Appeal has substantially and incorrectly limited the powers of arbitrators in relation to copyright. Its approach is inconsistent with the trend in the case law and legislation, which has been, for several decades, to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems, both common law and civil law.

39 The purpose and context of s. 37 of the *Copyright Act* demonstrate that it has two objectives. First, its intention is to affirm the jurisdiction that the provincial courts, as a rule, have in respect of private law matters concerning copyright. Second, it is intended to avoid fragmentation of trials concerning copyright that might result from the division of jurisdiction *ratione materiae* between the federal and provincial courts in this field.

40 The respondent's argument is that s. 37 of the *Copyright Act* does not permit questions of copyright to be referred anywhere other than to the public judicial system. Both Parliament and the provincial legislature, however, have themselves recognized the existence and legitimacy of the private

justice system, often consensual, parallel to the state's judicial system. In Quebec, for example, recognition of arbitration is reflected in art. 2638 *C.C.Q.*, which defines an arbitration agreement as "a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts". The *Civil Code* excludes from arbitration only "[d]isputes over the status and capacity of persons, family members or other matters of public order" (art. 2639 *C.C.Q.*). In like manner, the Parliament of Canada has recognized the legitimacy and importance of arbitration, for example by enacting the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.). That Act makes the *Commercial Arbitration Code*, which is based on the model law adopted by the United Nations Commission on International Trade Law on June 21, 1985, applicable to disputes involving the Canadian government, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters. Article 5 of the Code in fact makes arbitration the preferred method of resolving disputes in matters to which it applies.

41 However, an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.

42 The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.

43 Section 92(14) of the *Constitution Act, 1867* gives the provinces the power to constitute courts that will have jurisdiction over both provincial and federal matters. Section 101 of that Act allows the Parliament of Canada to constitute courts to administer federal laws. Unless Parliament assigns exclusive jurisdiction over a matter governed by federal law to a specific court, the courts constituted by the province pursuant to its general power to legislate in relation to the administration of justice will have jurisdiction over any matter, regardless of legislative jurisdiction (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 777). As this Court stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 28:

> Thus, even when squarely within the realm of valid federal law, the Federal Court of Canada is not presumed to have jurisdiction in the absence of an express federal enactment. On the other hand, by virtue of their general jurisdiction over all civil and criminal, provincial, federal, and constitutional matters, provincial superior courts do enjoy such a presumption.

44 In *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, this Court had to determine whether a province had the power to grant jurisdiction to a small claims court to hear admiralty law cases. La Forest J. found that grant of jurisdiction to be constitutionally valid, as follows, at p. 228:

> I conclude that a provincial legislature has the power by virtue of s. 92(14) of the *Constitution Act, 1867* to grant jurisdiction to an inferior court to hear a matter falling within federal legislative jurisdiction. This power is limited, however, by s. 96 of that Act and the federal government's power to expressly grant exclusive jurisdiction to a court established by it under s. 101 of the Act. Since neither of these exceptions applies in the present case, the grant of jurisdiction in s. 55 of the *Small Claims Courts Act* authorizes the Small Claims Court to hear the action in the present appeal.

45 A province has the power to create an arbitration system to deal with cases involving federal laws, unless the Parliament of Canada assigns exclusive jurisdiction over the matter to a court constituted pursuant to its constitutional powers or the case falls within the exclusive jurisdiction of the superior courts under s. 96 of the *Constitution Act, 1867*. The Parliament of Canada could also grant concurrent jurisdiction to specific provincial courts. For example, it could enact a provision stipulating that "the Federal Court shall have concurrent jurisdiction with provincial superior courts to hear all proceedings in relation to the administration of the Act". However, this is not what it did in this case.

46 Section 37 of the *Copyright Act* gives the Federal Court concurrent jurisdiction in respect of the enforcement of the Act, by assigning shared jurisdiction *ratione materiae* in respect of copyright to the Federal Court and "provincial courts". That provision is sufficiently general, in my view, to include arbitration procedures created by a provincial statute. If Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so (for a similar approach, see *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449 (Ont. C.A.), at pp. 457-58; J. E. C. Brierley, "La convention d'arbitrage en droit québécois interne", [1987] *C.P. du N.* 507, at para. 62). Section 37 is therefore not a bar to referring this case to arbitration. We must now consider whether doing so is prohibited by the civil law and rules of procedure of Quebec.

D. *Copyright, Public Order and Arbitration*

47 At this point, this case is governed by the statutory arrangements for arbitration in Quebec. The legal nature of the arbitration proceeding in question, however, requires further comment. The matter was referred to arbitration under s. 37 of the *Act respecting the professional status of artists*. That provision establishes arbitral jurisdiction. It allows one party to require that a matter be referred to an arbitrator. However, it allows the parties to renounce submission of a case to an arbitrator; that means that, unlike, for example, grievance arbitration under Canadian labour relations legislation, the

procedure is consensual in nature. (See, for example, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.)

48 The legal framework that governs this arbitration procedure is therefore the same as the one established by the relevant provisions of the *Civil Code* and the *Code of Civil Procedure*. The *Civil Code* recognizes the existence and validity of arbitration agreements. With the exception of questions of public order, and certain matters such as the status of persons, it gives the parties the freedom to submit any dispute to arbitration and to determine the arbitrator's terms of reference (art. 2639 *C.C.Q.*). The *Code of Civil Procedure* essentially leaves the manner in which evidence will be taken, and the procedure for the arbitration, to the parties and the authority of the arbitrator (arts. 944.1 and 944.10 *C.C.P.*).

49 Relying on arts. 946.5 *C.C.P.* and 2639 *C.C.Q.*, the Court of Appeal held that cases involving ownership of copyright may not be submitted to arbitration. In the Court's opinion, copyright, like moral rights, attaches to the personality of the author (at para. 40):

> [TRANSLATION] The right to fair recognition as the creator of a work, like the right to respect for one's name, carries a purely moral connotation that derives from the dignity and honour of the creator of the work. From that standpoint, the question of ownership of copyright cannot be arbitrable.

50 In addition, the Court of Appeal took the view that cases relating to ownership of copyright, as well as cases concerning the scope and validity of copyright, must be assigned exclusively to the courts because the decisions made in such cases may, as a rule, be set up against the entire world. The fact that they may be set up against third parties would therefore mean that they could not be left to arbitrators to decide, and rather must be disposed of by the public judicial system (para. 42).

51 Article 2639 *C.C.Q.* expressly provides that the parties may not submit a dispute over a matter of public order or the status of persons, which is, in any event, a matter of public order, to arbitration. Logically, art. 946.5 *C.C.P.* provides that a court can refuse homologation of an award where the matter in dispute cannot be settled by arbitration or is contrary to public order. Thus the law establishes a mechanism for overseeing arbitral activity that is intended to preserve certain values that are considered to be fundamental in a legal system, despite the freedom that the parties are given in determining the methods of resolution of their disputes. However, we must analyse the relationship between the application of rules that are regarded as matters of public order and arbitral jurisdiction in greater depth. Ultimately, that question deals with the limitations placed on the autonomy of the arbitration system and the nature of, and restraints on, intervention by the courts in consensual arbitration, which is governed by the civil law and civil procedure of Quebec.

52 In order to determine whether questions relating to ownership of copyright fall outside arbitral jurisdiction, as the Court of Appeal concluded, we must more clearly define the concept of public order in the context of arbitration, where it may arise in a number of forms, as it does here, for instance, in respect of circumscribing the jurisdiction *ratione materiae* of the arbitration (Thuilleaux, *supra*, at p. 36). Thus a matter may be excluded from the field covered by arbitration because it is by nature a "matter of public order". The concept also applies in order to define and, on occasion, restrict the scope of legal action that may be undertaken by individuals, or of contractual liberty. The variable, shifting or developing nature of the concept of public order sometimes makes it extremely difficult to arrive at a precise or exhaustive definition of what it covers. (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (5th ed. 1998), at pp. 151-52; *Auerbach v. Resorts International Hotel Inc.*, [1992] R.J.Q. 302 (C.A.), at p. 304; *Goulet v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 719, 2002 SCC 21, at paras. 43-46) The development and application of the concept of public order allows for a considerable amount of judicial discretion in defining the fundamental values and principles of a legal system. In interpreting and applying this concept in the realm of consensual arbitration, we must therefore have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. For that reason, in order to preserve decision-making autonomy within the arbitration system, it is important that we avoid extensive application of the concept by the courts. Such wide reliance on public order in the realm of arbitration would jeopardize that autonomy, contrary to the clear legislative approach and the judicial policy based on it. (*Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708 (C.A.), at p. 1712; *Mousseau v. Société de gestion Paquin ltée*, [1994] R.J.Q. 2004 (Sup. Ct.), at p. 2009, citing J. E. C. Brierley, "Chapitre XVIII de la convention d'arbitrage, art. 2638-2643", in Barreau du Québec et Chambre des notaires du Québec, *La réforme du Code civil: obligations, contrats nommés* (1993), vol. 2, at pp. 1067, 1081-82; J. E. C. Brierley, "Une loi nouvelle pour le Québec en matière d'arbitrage" (1987), 47 *R. du B.* 259, at p. 267; L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143)

53 A broad interpretation of the concept of public order in art. 2639, para. 1 *C.C.Q.* has been expressly rejected by the legislature, which has specified that the fact that the rules applied by an arbitrator are in the nature of rules of public order is not a ground for opposing an arbitration agreement (art. 2639, para. 2 *C.C.Q.*). The purpose of enacting art. 2639, para. 2 *C.C.Q.* was clearly to put an end to an earlier tendency by the courts to exclude any matter relating to public order from arbitral jurisdiction. (See *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783, at p. 2789, in which the Quebec Court of Appeal in fact stated its disagreement with the earlier decision in *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565; see also *Mousseau*, *supra*, at p. 2009.) Except in certain fundamental matters, relating, for example, strictly to the status of persons, as was found by the Quebec Superior Court to be the case in *Mousseau*, *supra*, an arbitrator may dispose of questions relating to rules of public order, since they may be the subject matter of the arbitration agreement. The arbitrator is not compelled to stay his or her proceedings the moment a matter that might be characterized as a rule or principle of public order arises in the course of the arbitration.

54 Public order arises primarily when the validity of an arbitration award must be determined. The limits of that concept's role must be defined correctly, however. First, as we have seen, arbitrators are frequently required to consider questions and statutory provisions that relate to public order in order to resolve the dispute that is before them. Mere consideration of those matters does not mean that the decision may be annulled. Rather, art. 946.5 *C.C.P.* requires that the award as a whole be examined, to determine the nature of the result. The court must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. In this case, the *Code of Civil Procedure* is more concerned with whether the disposition of a case, or the solution it applies, meets the relevant criteria than with whether the specific reasons offered for the decision do so. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. That approach, which is consistent with the language used in art. 946.5 *C.C.P.*, corresponds to the approach taken in the law of a number of states where arbitration is governed by legal rules analogous to those now found in Quebec law. The courts in those countries have limited the consideration of substantive public order to reviewing the outcome of the award as it relates to public order. (See: E. Gaillard and J. Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at pp. 955-56, No. 1649; J.-B. Racine, *L'arbitrage commercial international et l'ordre public*, vol. 309 (1999), at pp. 538-55, in particular at pp. 539 and 543; *Société Seagram France Distribution v. Société GE Massenez*, Cass. civ. 2^{e}, May 3, 2001, *Rev. arb.* 2001.4.805, note Yves Derains.) And lastly, in considering the validity of the award, the clear rule stated in art. 946.2 *C.C.P.*, which prohibits a court from inquiring into the merits of the dispute, must be followed. In applying a concept as flexible and changeable as public order, these fundamental principles must be adhered to in determining the validity of an arbitration award.

55 This case raises a number of aspects of the application of the rules and principles that form part of public order. We must first ask whether copyright, as a moral right, is analogous to the matters enumerated in art. 2639, para. 1 *C.C.Q.* and is therefore outside the jurisdiction *ratione materiae* of the arbitration system. Second, we must determine whether that provision prohibits arbitration as to the ownership of copyright based on the *erga omnes* nature of this type of decision. And third, although the question of the validity of the contracts was not before the arbitrator in this case, as we have seen, because of the discussion that took place between the parties, it is nonetheless useful to consider whether the arbitrator might have had the authority to declare the publishing contracts invalid because of the defects of form that were alleged to exist in them, under the rules set out in ss. 31 and 34 of the *Act respecting the professional status of artists*.

(i) Public Order and the Nature of Copyright

56 In my view, the Court of Appeal was in error when it said that the fact that s. 14.1 of the *Copyright Act* provides that moral rights may not be assigned means that problems relating to the ownership of copyright must be treated in the same manner as questions of public order, because they relate to the status of persons and rights of personality, and must therefore be removed from the jurisdiction of arbitrators. The opinion of the Court of Appeal is based on an incorrect understanding of the nature of copyright in Canada and of the way in which the legal mechanisms that govern copyright

and provide for it to be exercised and protected operate.

57 Parliament has indeed declared that moral rights may not be assigned, but it permits the holders of those rights to waive the exercise of them. The Canadian legislation therefore recognizes the overlap between economic rights and moral rights in the definition of copyright. This Court has in fact stressed the importance placed on the economic aspects of copyright in Canada: the *Copyright Act* deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it. (See *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at paras. 11-12, *per* Binnie J.)

58 In the context of Canadian copyright legislation, although the work is a "manifestation of the personality of the author", this issue is very far removed from questions relating to the status and capacity of persons and to family matters, within the meaning of art. 2639 *C.C.Q.* (M. Goudreau, "Le droit moral de l'auteur au Canada" (1994), 25 *R.G.D.* 403, at p. 404). The Act is primarily concerned with the economic management of copyright, and does not prohibit artists from entering into transactions involving their copyright, or even from earning revenue from the exercise of the moral rights that are part of it. As the intervenors UNEQ and CMA point out, an artist may even charge for waiving the exercise of his or her moral rights (see *Théberge*, *supra*, at para. 59).

59 In addition, the Quebec legislation recognizes the legitimacy of transactions involving copyright, and the validity of using arbitration to resolve disputes arising in respect of such transactions: in s. 37 of the *Act respecting the professional status of artists*, the legislature has expressly provided that in the absence of an express renunciation, every dispute between an artist and a promoter shall be submitted to an arbitrator. Contracts between artists and promoters systematically contain stipulations relating to copyright. It would be paradoxical if the legislature were to regard questions concerning copyright as not subject to arbitration because they were matters of public order, on the one hand, and on the other hand to direct that this method of dispute resolution be used in the event of conflicts relating to the interpretation and application of contracts that govern the exercise of that right as between artists and promoters.

60 Accordingly, the award in issue in this case does not deal with a matter that by its nature falls outside the jurisdiction of the arbitrators. It is therefore not contrary to public order; if it had been, a court would have been justified in annulling it (art. 946.5 *C.C.P.*). On the contrary, it is a valid disposition of a matter, ownership of copyright, that is one of the primary elements of the dispute between the parties in respect of the interpretation and application of the agreements between them.

(ii) Public Order and the *Erga Omnes* Nature of Decisions Concerning Copyright

61 In the opinion of the Court of Appeal, the fact that a decision in respect of copyright may be set up against the entire world, and accordingly the nature of its effects on third parties, was a bar to the arbitration proceeding. Those characteristics meant that only the courts could hear such cases (Court of Appeal decision, at paras. 42 and 44). That interpretation is based on an error as to the nature of the concept of *res judicata* and the extent to which decisions made in the judicial system may be set up against third parties.

62 First, the *Code of Civil Procedure* does not consider the effect of an arbitration award on third parties to be a ground on which it may be annulled or its homologation refused (art. 946.4 *C.C.P.*). As the appellants assert, the opinion of the Court of Appeal on this question fails to have regard to the principle of *res judicata*, which holds that a judgment is authoritative only as between the parties to the case (art. 2848 *C.C.Q.*; see J.-C. Royer, *La preuve civile* (2nd ed. 1995), at pp. 490-91). The arbitration proceeding in this case was between two private parties involved in a dispute as to the proper interpretation of a contract. The arbitrator ruled as to the ownership of the copyright in order to decide as to the rights and obligations of the parties to the contract. The arbitral decision is authority between the parties, but is not binding on third parties who were not involved in the proceeding. To illustrate this point, there would be nothing to prevent someone who was not a party to the arbitration agreement who had also been involved in writing the texts for the Caillou books from applying to a court to have his or her copyright recognized.

(iii) Sections 31 and 34 of the *Act respecting the professional status of artists*

63 In the alternative, the Court of Appeal held that the arbitrator had a duty to ensure that the mandatory formalities imposed by ss. 31 and 34 of the *Act respecting the professional status of artists* had been complied with in the formation of the contracts, and that he had failed to perform that duty (Court of Appeal decision, at paras. 48-49). Our examination of the conduct of the arbitration disposed of that criticism, because the problem of contract validity was excluded from the arbitrator's mandate by the decision of Bisaillon J. of the Superior Court.

64 At this stage in the consideration of the appeal, it is worth recalling certain features of the mechanism for submitting disputes to an arbitrator under s. 37 of the *Act respecting the professional status of artists*. Either of the two parties may decide to refer a dispute arising from the interpretation and application of the provisions of a contract subject to the Act to the arbitrator. However, if both parties agree to limit the arbitrator's terms of reference, he may not expand his mandate on his own initiative. Nonetheless, to the extent that his terms of reference included an examination of the validity of the contracts and in particular of the formalities and rules characterized as mandatory that are found in ss. 31 and 34 of the Act, such as those relating to the term for which the parties were bound by their agreement, the arbitrator should have decided whether the contracts were valid. The contrary solution

would result in a multiplicity of proceedings in cases where a dispute related to both the interpretation of the clauses of the contract and the validity of the contract. That solution would offend one of the fundamental principles of arbitration, which is designed to provide parties to a contract with an effective and efficient forum for resolving their disputes (*Compagnie nationale Air France v. Mbaye*, [2000] R.J.Q. 717 (Sup. Ct.), at p. 724). And lastly, it would indeed be surprising if an arbitrator could rule as to the ownership of copyright, having regard to the provisions of the *Copyright Act*, but not as to the mandatory provisions of the *Act respecting the professional status of artists*, which, after all, deals only with the terms and conditions for the exercise of copyright itself.

(iv) Limits on Review of the Validity of Arbitration Decisions

65 The Court of Appeal stated at para. 49:

> [TRANSLATION] Where an arbitrator, in performing his or her mandate, is required to apply the rules of public order, he or she must apply them correctly, that is, in the same manner as do the courts.

66 That statement runs counter to the fundamental principle of the autonomy of arbitration (*Compagnie nationale Air France*, *supra*, at p. 724). What it necessarily leads to is review of the merits of the dispute by the court. In addition, it perpetuates a concept of arbitration that makes it a form of justice that is inferior to the justice offered by the courts (*Condominiums Mont St-Sauveur*, *supra*, at p. 2785).

67 The legislature has affirmed the autonomy of arbitration by stating, in art. 946.2 *C.C.P.*, that "[t]he court examining a motion for homologation cannot enquire into the merits of the dispute". (That provision is applicable to annulment of an arbitration award by the reference to it in art. 947.2 *C.C.P.*) In addition, the reasons for which a court may refuse to homologate or annul an arbitration award are exhaustively set out in arts. 946.4 and 946.5 *C.C.P.*

68 Despite the specificity of these provisions of the *Code of Civil Procedure* and the clarity of the legislative intention apparent in them, there have been conflicting lines of authority in the Quebec case law regarding the limits of judicial intervention in cases involving applications for homologation or annulment of arbitration awards governed by the *Code of Civil Procedure*. Some judgments have taken a broad view of that power, or sometimes tended to confuse it with the power of judicial review provided for in arts. 33 and 846 *C.C.P.* (On this point, see the commentary by F. Bachand, "Arbitrage commercial: Assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les

arbitres" (2001), 35 *R.J.T.* 465.) The judgment in issue here illustrates this tendency when it adopts a standard of review based on simple review of any error of law made in considering a matter of public order. That approach extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases intended by the legislature. It ignores the fact that the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system. Public order will of course always be relevant, but solely in terms of the determination of the overall outcome of the arbitration proceeding, as we have seen.

69 This latter approach has been adopted by a significant line of authority. It recognizes that the remedies that may be sought against arbitration awards are limited to the cases set out in arts. 946 *et seq. C.C.P.* and that judicial review may not be used to challenge an arbitration decision or, most importantly, to review its merits (*Compagnie nationale Air France*, *supra*, at pp. 724-25; *International Civil Aviation Organization v. Tripal Systems Pty. Ltd.*, [1994] R.J.Q. 2560 (Sup. Ct.), at p. 2564; *Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Constructions Méridien inc.*, [1996] R.J.Q. 1236 (Sup. Ct.), at p. 1238; *Régie de l'assurance-maladie du Québec v. Fédération des médecins spécialistes du Québec*, [1987] R.D.J. 555 (C.A.), at p. 559, *per* Vallerand J.A.; *Tuyaux Atlas, une division de Atlas Turner Inc. v. Savard*, [1985] R.D.J. 556 (C.A.)). Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law. Thibault J.A. identified this problem when she said:

> [TRANSLATION] In my view, the argument that an interpretation of the regulation that is different from, and in fact contrary to, the interpretation adopted by the ordinary courts means that the arbitration award exceeds the terms of the arbitration agreement stems from a profound misunderstanding of the system of consensual arbitration. The argument makes that separate system of justice subject to review of the correctness of its decisions, and thereby substantially reduces the latitude that the legislature and the parties intended to grant to the arbitration board.
>
> (*Laurentienne-vie, compagnie d'assurance*, *supra*, at para. 43)

(v) The Conduct of the Arbitration and Natural Justice

70 Desputeaux alleged that the arbitrator failed to hear testimony or consider evidence relating to ownership of the copyright. In her submission, that error justified annulling the award. Articles 2643 *C.C.Q.* and 944.1 *C.C.P.*, as we know, affirm the principle of procedural flexibility in arbitration proceedings, by leaving it to the parties to determine the arbitration procedure or, failing that, leaving it up to the arbitrator to determine the applicable rules of procedure (*Entreprises H.L.P. inc. v. Logisco*

inc., J.E. 93-1707 (C.A.); *Moscow Institute of Biotechnology v. Associés de recherche médicale canadienne (A.R.M.C.)*, J.E. 94-1591 (Sup. Ct.), at pp. 12-14 of the full text). The rules in the *Code of Civil Procedure* governing an arbitration proceeding do not require that the arbitrator hear testimonial evidence. The methods by which evidence may be heard are flexible and are controlled by the arbitrator, subject to any agreements between the parties. It is therefore open to the parties, for example, to decide that a question will be decided having regard only to the contract, without testimony being heard or other evidence considered. A decision made on the record, without witnesses being heard in the presence of the arbitrator, does not violate any principle of procedure or natural justice, and may not be annulled on that ground alone.

71 Nonetheless, the arbitrator clearly does not have total freedom in respect of procedure. Under arts. 947.2 and 946.4, para. 3 *C.C.P.*, an arbitration award may be annulled where "the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case". The record considered here, however, does not support a complaint of that sort. Its content does not show that the facts that are needed in order for it to be reviewed exist, and therefore does not justify this Court's intervention in that regard.

VI. Conclusion

72 The arbitrator acted in accordance with his terms of reference. He made no error such as would permit annulment of the arbitration award. For these reasons, the appeal must be allowed, the decision of the Court of Appeal set aside and the application for annulment of the award dismissed with costs throughout.

Appeal allowed with costs.

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